

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
)  
Implementation of the Cable Television )  
Consumer Protection and Competition )  
Act of 1992 )  
)  
Review of the Commission's Cable )  
Attribution Rules )

CS Docket No. 98-82

COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("*DIRECTV*")<sup>1</sup> hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.

**I. INTRODUCTION**

Congress enacted the program access law<sup>2</sup> with the intent of curbing the incentives for cable operators to influence the behavior of cable-affiliated program suppliers to the detriment of cable's competitors.<sup>3</sup> In implementing the statute in 1993, the Commission found that this crucial policy objective warranted "a relatively inclusive attribution rule."<sup>4</sup> Very

<sup>1</sup> DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and wholly-owned subsidiary of Hughes Electronics Corporation.

<sup>2</sup> 47 U.S.C. § 548.

<sup>3</sup> See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, at ¶ 32 (1993) ("*Program Access Order*").

<sup>4</sup> *Program Access Order* at ¶ 31.

little has changed since then. This policy rationale and the corresponding restrictive attribution standard remain just as valid today, only a few years after the statute's creation. Cable operators still dominate 87 percent of the MVPD audience,<sup>5</sup> which makes them able to influence, either directly or indirectly, the behavior of programming vendors. The largest cable MSOs continue to grow and accumulate greater programming ownership interests. In fact, using the broadcast attribution standard (which governs horizontal and vertical cable ownership) that is less demanding than the program access attribution standard,<sup>6</sup> the number of vertically integrated program services is increasing and includes over half of the 50 most popular cable programming networks.<sup>7</sup> Thus, the cable industry retains the incentive and ability to stifle MVPD competition by directly controlling or indirectly manipulating the supply of programming to its emerging competitors.

Cable operators are exploiting their influence. Recent program access cases demonstrate that certain vertically integrated programmers are restricting the supply of

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<sup>5</sup> *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Fourth Annual Report, FCC 97-423, at ¶ 7 (January 13, 1998) ("*Fourth Annual Report*").

<sup>6</sup> The "program access attribution standard" is more restrictive than the "broadcast attribution standard" which applies to broad structural rules such as those restricting horizontal and vertical ownership. Specifically, the broadcast attribution standard attributes partnership interests, direct ownership interests, and voting stock interests of 5 percent or more, plus passive investors with 10 percent voting stock; non-voting stock interests, the interests of "insulated" limited partners, and minority interests under a single majority shareholder are not attributed. *See* NPRM at ¶ 3. The more restrictive standard, which applies to program access rules and other rules designed "to deter specific discriminatory or improper conduct by cable operators or programmers," attributes voting or non-voting stock interests of 5 percent or more, as well as limited partnership interests of 5 percent or more regardless of insulation, and does not apply the single majority shareholder rule. *Id.* at ¶ 5.

<sup>7</sup> *Fourth Annual Report* at ¶ 160.

programming to or discriminating against non-cable MVPDs.<sup>8</sup> This anticompetitive conduct can significantly impede the ability of non-cable MVPDs to compete in the cable-dominated MVPD marketplace, which the Commission acknowledged when it recently found appropriate a damages remedy for program access violations.<sup>9</sup> Vigorous enforcement of the program access rules and retention of a strict program access attribution standard are more vital now than ever before. Because the rationale for a restrictive attribution standard remains valid, revisiting the cable attribution threshold for the program access rules is unnecessary and unwarranted at this juncture, and, if relaxed, would threaten developing MVPD competition.

## **II. THE STRICT PROGRAM ACCESS ATTRIBUTION STANDARD REMAINS NECESSARY TO DETER SPECIFIC DISCRIMINATORY OR IMPROPER CONDUCT**

An attribution standard for program access should accurately identify those relationships that generate or reinforce incentives to engage in behavior that is contrary to “the objectives of the particular cable regulation at issue.”<sup>10</sup> The program access rules have always been subject to an attribution standard that is more restrictive than other more general broadcast or cable ownership rules. Specifically, the Commission considers as a “cognizable interest” for program access purposes a cable operator’s holding of five percent or more of voting or non-

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<sup>8</sup> See, e.g., *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd 15209 (1997); *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc., and Cablevision Systems Corporation*, 12 FCC Rcd 9892 (1997); *Echostar Communications Corporation v. Fox/Liberty Networks, L.L.C.*, DA 98-730 (April 17, 1998); *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. FX Networks, L.L.C.*, DA 98-1295 (June 30, 1998).

<sup>9</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, RM No. 9097, FCC 98-189, at ¶¶ 11, 17-18 (August 10, 1998) (“*Program Access Enforcement Order*”).

<sup>10</sup> See NPRM at ¶ 12.

voting stock, does not apply the single majority shareholder rule, and attributes limited partnership interests of five percent or more, regardless of insulation.

In the NPRM, the Commission seeks comments on, among other things, “whether the assumptions underlying [the] cable attribution rules are still valid,”<sup>11</sup> including whether the more restrictive program access attribution standard should be retained or revised.<sup>12</sup> Since the level of vertically integrated programming and the cable industry’s MVPD dominance have changed little since 1992, the restrictive program access attribution standard should be retained, regardless of any modification to the attribution standard that governs horizontal and vertical cable or broadcast ownership.

**A. The Restrictive Program Access Attribution Standard Serves Its Intended Purposes**

There simply is no basis for the Commission to reevaluate the current restrictive attribution standard for program access. There can be no dispute that vertically integrated programming vendors have both the incentive and ability to favor their affiliated cable operators over unaffiliated cable operators and alternative technology programming distributors. The program access law was intended to prevent cable operators from using their market power to engage in or improperly influence conduct by cable-affiliated programmers, as well as to promote competition and diversity in the MVPD market.<sup>13</sup> While the program access rules have

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<sup>11</sup> *Id.* at ¶ 13.

<sup>12</sup> *Id.* at ¶ 14.

<sup>13</sup> *See Program Access Enforcement Order* at ¶ 2. In the 1992 Cable Act, Congress specifically outlined the policy underlying the program access law: to “ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.” Section 2(b)(5) of the Cable Television Consumer Protection and Competition Act of 1992, codified at 47 U.S.C. § 521 Note.

a prophylactic component, they are designed principally to correct this inherent imbalance of power. According to the Commission:

The 1992 Cable Act and its legislative history reflect congressional findings that horizontal concentration in the cable television industry, combined with extensive vertical integration . . . has created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors. This imbalance has limited the development of competition and restricted consumer choice.<sup>14</sup>

Due to this imbalance, emerging competitors to the entrenched cable industry faced “numerous situations” in which their ability to secure programming needed in order to provide a viable and competitive multichannel alternative had been impaired.<sup>15</sup> The Commission specifically found that this anticompetitive conduct warranted “targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming.”<sup>16</sup> Thus, in recognition of the critical importance of fair access to programming for all MVPDs and to “ensure that all entities with potential incentives to engage in anticompetitive conduct are covered by [the] rules,” the Commission deliberately adopted a “fairly strict attribution standard.”<sup>17</sup>

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<sup>14</sup> *Program Access Order* at ¶ 21.

<sup>15</sup> *Id.* at ¶ 9.

<sup>16</sup> *Id.* at ¶ 63 (quoting *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, Report, 5 FCC Rcd 4962, 5031 (1990)).

<sup>17</sup> *Id.* at ¶ 11.

**B. The Attribution Standard Under The Program Access Law Appropriately Differs From The Broadcast Attribution Standard**

The Commission seeks comment on whether differences exist between the cable and broadcasting industries that would support separate attribution standards for rules that safeguard competition and diversity and those that are designed to deter specific anticompetitive behavior, such as the program access rules.<sup>18</sup> The Commission previously examined this issue in the initial program access order, and found that most commenters favored treating attribution for program access purposes separately from attribution for broadcast ownership limits.<sup>19</sup> Incorporating the specific policy goals of Congress and the costs and risks associated with various levels of “influence,” the Commission concluded that congressional intent in the program access context was more analogous to the rationale used in setting a restrictive attribution limit in the video dialtone context than to the intent underlying the broadcast ownership limits, thus justifying use of the more restrictive standard for the program access rules.<sup>20</sup>

Congress in fact sought specific objectives in the program access context that extend beyond its policy objectives for more general broadcast ownership limits. With program access, the legislative history of the 1992 Cable Act reveals that “Congress was concerned with expanding the availability of programming and eliminating unjustified discrimination in the price charged to non-cable technologies.”<sup>21</sup> Thus, congressional concern extended to “industry-wide

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<sup>18</sup> NPRM at ¶¶ 13, 14.

<sup>19</sup> *Program Access Order* at ¶ 26.

<sup>20</sup> *Id.* at ¶ 31-32; see *Telephone Company-Cable Television Cross-Ownership Rule*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, at ¶¶ 35-36 (1992).

<sup>21</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order on Reconsideration of the First Report and

influences that can occur even in the absence of a vertical relationship in the complainant's specific market."<sup>22</sup> On the other hand, "the concerns addressed in the Commission's horizontal and vertical ownership proceedings, where the broadcast attribution standards were adopted, [were] quite different from the concerns in program access."<sup>23</sup> As the Commission explained:

In particular, the amount of ownership and, therefore, an entity's "control" is the focus of the vertical and horizontal ownership rules. By comparison, the attribution standard in the program access rules is focused on the potential "influence" on programming vendor behavior through ownership by cable interests, *irrespective of the amount of ownership that may be involved*.<sup>24</sup>

Because the program access rules address the more elusive concept of "influence" as compared to "control," the Commission is fully justified in excluding the single majority shareholder exception and retaining the more restrictive attribution standard.

The Commission initiated its broadcast attribution review in response to the relaxation of ownership rules resulting from the passage of the Telecommunications Act of 1996 ("1996 Act").<sup>25</sup> Section 202 of the 1996 Act, for example, directed the Commission to eliminate the limit on the number of television stations that a person or entity may own nationwide and to

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Order, FCC 94-287/94-326, at ¶ 7 (1994); *see id.* at ¶ 35 ("The legislative history of Section 628 specifically, and the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies").

<sup>22</sup> *Id.* at ¶ 11.

<sup>23</sup> *Program Access Reconsideration Order* at ¶ 44.

<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable MDS Interests*, Further Notice of Proposed Rulemaking, 11 FCC Rcd 19895 at ¶ 2 (1996).

relax the local market limits.<sup>26</sup> Conversely, Congress has taken no steps to loosen the program access law; nor has it directed the Commission to loosen the program access rules.<sup>27</sup> Changes resulting from the passage of the 1996 Act do not and should not affect the Commission's program access attribution standard.

**C. The Program Access Attribution Standard Should Not Be Changed**

As they did in 1992, cable operators continue to have the power to influence the behavior of programming vendors. The Fourth Annual Report states that 87 percent of MVPD subscribers still receive service from their local franchised cable operator.<sup>28</sup> The cable industry's dominant share of the MVPD audience remains "a cause for concern,"<sup>29</sup> especially as "[l]ocal markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems."<sup>30</sup> Furthermore, using the broadcast attribution standard that encompasses fewer relationships than the more restrictive program access attribution standard, the Commission has found that the actual number of vertically integrated national cable

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<sup>26</sup> As Commissioner Chong explained, "the 1996 Act evinces Congress' clear intention that we loosen our regulatory grip *on the broadcast medium*" to give broadcasters greater flexibility to compete with cable and other MVPDs. *Id.* Separate Statement of Commissioner Rachelle B. Chong (emphasis added).

<sup>27</sup> In fact, some in Congress believe the program access law should be strengthened. *See* H.R. 4352, 105th Cong., 2d Sess. (1998).

<sup>28</sup> *Fourth Annual Report* at ¶ 7.

<sup>29</sup> *Id.* at ¶ 8.

<sup>30</sup> *Id.* at ¶ 11, Local, Regional, and National Horizontal Market Developments.



programming services increased each year between 1995 and 1997. In 1997, 68 national cable programming services were vertically integrated, up from 67 in 1996 and 66 in 1995.<sup>31</sup>

As these figures bear out, in today's programming environment the largest cable MSOs are accumulating more power. The market share of the four largest cable MSOs (TCI, Time Warner, MediaOne, and Comcast) continues to increase.<sup>32</sup> TCI, for example, holds ownership interests in at least 23 percent of all national programming services.<sup>33</sup> Cablevision now owns the underlying facilities (Madison Square Garden), the program content (the Knicks and the Rangers), the programming services (MSG and SportsChannel networks) and the cable systems that transmit regional sports programming in the New York market.<sup>34</sup> Cablevision's New York holdings provide just one example of how cable operators are focusing on the particularly lucrative, and competitively essential, regional sports programming market.<sup>35</sup>

As the state of MVPD competition demonstrates, the cable industry's control over programming remains an obstacle to MVPD competition and must continue to be restricted. Concentration of ownership and consolidation of cable systems into regional clusters only strengthen the cable industry's influence over program suppliers.<sup>36</sup> In the perceptions of program

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<sup>31</sup> See *id.*; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, at ¶ 142 (1997).

<sup>32</sup> See *Fourth Annual Report* at ¶ 151.

<sup>33</sup> *Id.* at ¶ 161. TCI's Liberty Media Group claims ownership interests in "more than 100 individual channels of programming." TCI Annual Report 1997, available at <[http://www.tci.com/tci.com/annualreports/tci\\_97sr/libgrp.html](http://www.tci.com/tci.com/annualreports/tci_97sr/libgrp.html)>.

<sup>34</sup> See *Fourth Annual Report* at ¶ 167.

<sup>35</sup> The merger of TCI-affiliated Fox/Liberty regional sports networks with the Cablevision-affiliated SportsChannel networks also vividly demonstrates the increased integration and consolidation of regional sports programming with MSO ownership. *Id.* at ¶ 166.

<sup>36</sup> See *id.* at ¶ 149.

suppliers, no alternative MVPD has yet achieved a distribution level that promises a substitute distribution channel for cable.<sup>37</sup> For these reasons, programmers remain principally dependent on cable MSOs and may be easily influenced to restrict the supply of programming to non-cable MVPDs.

The existing five percent restrictive standard provides a clear and concise threshold that adequately accounts for the program access law's behavioral component, yet is not over-inclusive. In addition, the strict program access attribution standard has not caused a backlash in capital investment in program creation or distribution. Nor is there any evidence that cable operators have refrained from investing in new program services primarily to avoid the strict attribution standard. Thus, the Commission should not alter the program access cable attribution standard that was carefully crafted only a few years ago.

**D. Vigorous Enforcement Of The Program Access Rules Is More Important Now Than Ever Before**

Relaxing the program access attribution standard would forestall entry into and inhibit competition in the developing multichannel video marketplace. Viewers would not benefit in any way from a relaxed program access attribution standard, for it would only insulate some potentially influential relationships from the reach of program access protections. Moreover, the Commission cannot loosen the program access attribution standard and still remain faithful to Congress's distinct program access policy goals.

The Commission has consistently refused to set a program access threshold above five percent or relax other aspects of the program access attribution standard, and for good

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<sup>37</sup> See *id.* at ¶ 155.

reason. In the initial Program Access Order, the Commission explained that “a standard of more than five percent could allow cable operators to exert significant influence over their affiliated programmers without being subject to the statute.”<sup>38</sup> In the ensuing Reconsideration Order, the Commission stated that it “not only was concerned with a cable operator’s control over programming, but also recognized that there could be *significant influence even with a relatively small vertical interest*.”<sup>39</sup> This statement still rings true today, particularly in light of the increase in vertical integration found by the Commission in the Fourth Annual Report.<sup>40</sup> A five percent ownership interest, whether voting or non-voting or whether an insulated limited partner, while not comprising “control” over the entity, can still generate significant “influence” over program suppliers.

Recent program access cases demonstrate the continuing need for a strict program access attribution standard. Programmers affiliated with cable operators continue to show their unwillingness to deal with alternative MVPDs on fair terms.<sup>41</sup> In fact, the Commission recently stated that it has “encountered several program access complaints involving . . . the same or substantially the same conduct by programming providers.”<sup>42</sup> Accordingly, the cable industry has not shown that it can voluntarily erase its monopoly-driven market power and influential

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<sup>38</sup> *Program Access Order* at ¶ 32. The Commission also specifically rejected Viacom’s suggestion to adopt a de minimis exemption for those program vendors whose affiliated cable systems contribute less than five percent to its subscriber base. *Program Access Reconsideration Order* at ¶ 35.

<sup>39</sup> *Program Access Reconsideration Order* at ¶ 35 (emphasis added).

<sup>40</sup> *See supra* pp. 8-9.

<sup>41</sup> *See supra* n. 8.

<sup>42</sup> *Program Access Enforcement Order* at ¶ 18.

control over the supply of programming. Thus, the Commission must closely scrutinize and vigorously enforce the program access rules and policies.

Cable operators are also continuing their efforts to blunt competition from high-power DBS service through bold attempts to circumvent the program access law. One particularly alarming example of a way in which cable operators seek to avoid the application of program access requirements altogether is the strategy of "terrestrial evasion" -- *i.e.*, causing programming that has been or would have been distributed by satellite to be distributed to cable operators using fiber optic cable, microwave, or some other terrestrial means, and then using the fact of that terrestrial distribution to attempt to justify refusing to sell such programming to alternative MVPDs.<sup>43</sup> This type of behavior cuts right to the heart of what the program access law was intended to foreclose -- discrimination against and preclusion of access to vital programming by cable's emerging competitors. Although the FCC rejected the adoption of a generalized rule prohibiting such behavior at this time, the terrestrial evasion that is occurring in Philadelphia is in fact "significant and causing competitive harm."<sup>44</sup> Until the Commission can accurately conclude that local markets for the delivery of video programming are fully competitive, the Commission must continue to be vigilant in foreclosing such attempts by incumbent cable operators to reduce competition in the MVPD market.

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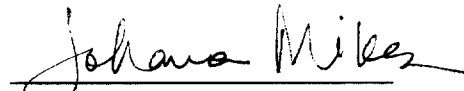
<sup>43</sup> See *DIRECTV, Inc. v. Comcast Corp.*, FCC File No. CSR-5112-P (Sept. 23, 1997) (pending); *Echostar Communications Corp. v. Comcast Corp.*, FCC File No. CSR-5244-P (May 19, 1998) (pending).

<sup>44</sup> See *Program Access Enforcement Order* at ¶ 71 (rejecting the adoption of a generalized rule at this time based on an insufficient record of harm). DIRECTV's and Echostar's pending program access complaints are concrete examples of a particular cable operator's unlawful and anticompetitive conduct that significantly impedes its competitors' access to programming, and should swiftly be resolved.

### III. CONCLUSION

Because the more restrictive attribution standard remains just as crucial today as it was when adopted, the Commission should retain it for the program access rules. The program access law is designed not only to promote competition and diversity but, more importantly, to prevent cable operators from improperly influencing program suppliers. The existing strict program access attribution standard remains necessary to curb the inherent influence of the dominant cable industry upon program suppliers. Altering the program access attribution standard at this critical juncture would contravene the congressional and Commission policies promoting MVPD competition.

Respectfully submitted,



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